In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 389

JOHN W. TYNAN, GENE Z. HANRAHAN AND WILLIAM T. P. SHEA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 19, 1963, petitioners were convicted in the United States District Court for the District of Columbia on seventeen counts of mail fraud in violation of 18 U.S.C. 1341; each was sentenced to serve from twenty months to five years in prison on each count, the sentences to run concurrently. On June 24, 1965 the Court of Appeals for the District of Columbia remanded the case to the district court to determine whether the delay in bringing petitioners to trial violated the Sixth Amendment or Rule 48(b), F.R. Crim. P. *Hanrahan* v. *United States,* 348 F. 2d 363 (C.A.D.C.) (Pet. App. A). On remand, the district

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court concluded that petitioners were not deprived of their Sixth Amendment rights and that the delay was not of such a nature as to warrant dismissal pursuant to Rule 48(b). 255 F. Supp. 957 (Pet. App. C). That determination was affirmed on appeal, 376 F. 2d 761 (Pet. App. B), and is the subject of the present petition.

The factual background is set forth in detail in the opinion of the district court (Pet. App. C); a summary follows.

1. Prior to the hearing on the remand, petitioners Shea and Hanrahan had filed affidavits of prejudice pursuant to 28 U.S.C. 144, alleging that Judge Sirica was biased because of certain statements he had made during the course of the trial. Those statements related to the credibility of petitioners as well as to the issue of delay (Pet. 4–6). The judge refused to recuse himself, because both the affidavit and the certificate of good faith were legally insufficient. 248 F. Supp. 471. The court of appeals found this ruling correct, since the allegations of bias failed to asert that the judge's views were derived from any source other than the judicial proceedings themselves. Petitioners do not challenge that ruling.

In this Court, they assert that the trial judge should have disqualified himself for personal bias as a matter of due process because, during the trial, he had expressed doubt as to credibility of some of the petitioners. The statements had been made at trial and were based on the evidence produced; in no way do they indicate that the judge could not fairly decide

the discrete issues posed on the remand. See *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583.

The issues considered on the remand did not relate to the guilt or credibility of the petitioners, but rather to the causes for the delay in bringing petitioners to trial. None of the petitioners testified at the remanded hearing. It is therefore difficult to perceive how the alleged opinion of the judge concerning petitioners' guilt or credibility could be said to have influenced the determination of whether there had been unnecessary delay. While it is true that the judge did express an opinion as to the merits of the petitioners' argument concerning delay, that declaration was made after a previous motion based on the lack of a speedy trial had been denied by another judge. Petitioners in no way support their attack on the fairness of the remanded proceeding by pointing to any partiality displayed by the judge at that hearing.

2. Petitioners' contention that, in reviewing the remanded proceeding, the court of appeals ignored its previous mandate to the district court is totally lacking in substance. In its first opinion the court of appeals ordered the district court to determine whether all the delay attributable to the government was necessary for a fair and just trial of petitioners on the charges. It then said that if the court should find that the prosecution was the result of deliberate or negligent delay "and the prosecutor fails to show 'that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay,' " then the conviction should be set aside.

Judge Sirica, in his exhaustive opinion, found that the original prosecution had been properly brought in the District of Puerto Rico and that it had not been brought there for any "supposed advantage." The judge also stated "that under the unusual and complicated circumstances of this most involved case" the delays were not "arbitrary [or] capricious," but were on the contrary, "necessary for fair and just prosecution of the charges" (Pet. App. C 49–50). He also found that there had been no prejudice to the petitioners resulting in increased difficulty in defending themselves[1] (Pet. App. C 50–56). The court of appeals after having "carefully considered" the case for the second time declared that upon the entire record, "measured by the mandate of this court fashioning the issues," the findings and rulings of Judge Sirica were amply supported by substantial evidence (Pet. App. B 27).

Petitioners argue that neither the district court nor the court of appeals found that "all" the delay was

[1] Petitioners' chief reliance in this regard was placed upon the fact that numerous records in their possession were destroyed by a flood during the pendency of the case. They claimed that destruction of these records, containing the names and addresses of certain satisfied clients, hindered them in obtaining testimony of these clients. Judge Sirica decided that, since the records were destroyed while they were in the petitioners' possession and during the pendency of the charges in the Puerto Rican court, the delay was not a proximate cause of their destruction and that the actions of the government did not contribute to their destruction. The judge further pointed out that at all times the petitioners had in their possession names and addresses of satisfied customers residing in the United States who could have testified on behalf of petitioners but were never called (Pet. App. C 51–53).

necessary and that the record showed that some delay attributable to the prosecution was unnecessary. This argument ignores the district court's finding, on which the court of appeals relied (see Pet. App. B 24), that the government "has demonstrated that the defendants suffered no serious prejudices as a result of the delays which did not ensue from the ordinary and inevitable delay." That finding was in the express terms of the mandate of the earlier appellate opinion.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

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